Nos. 96-1550 and 96-1551

In the Supreme Court of the United States

OCTOBER TERM, 1996

Supreme Court, U.S.
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THE NATIONAL FEDERATION OF THE BLIND, *et al.*,
Petitioners,
v.
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

MARYLAND STATE DEPARTMENT OF EDUCATION,
Petitioner,
v.
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR *AMICI CURIAE* COMMONWEALTH OF VIRGINIA AND STATES OF COLORADO, ILLINOIS, MISSISSIPPI AND RHODE ISLAND IN SUPPORT OF PETITIONERS

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BRIEF FOR *AMICI CURIAE* COMMONWEALTH OF VIRGINIA AND STATES OF COLORADO, ILLINOIS, MISSISSIPPI AND RHODE ISLAND IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI*

The Virginia Department for the Visually Handicapped (DVH) is a State licensing agency under the Randolph-Sheppard Act, 20 U.S.C. §§ 107, *et seq.* (the "Act").

Each such state licensing agency is responsible for licensing blind vendors seeking positions in federal installations in its state and for protecting the interests of those vendors in seeking such positions.[1] *See generally* 20 U.S.C. §§ 107b, 107b-1; 34 C.F.R. §§ 395.4, 395.5, 395.6.

The Act allows a State licensing agency, if it determines that a federal host agency is failing to comply with the Act or its regulations, to "file a complaint with the Secretary [of Education,] who shall convene a panel to arbitrate the dispute." 20 U.S.C. § 107d-1(b). The Act also provides that "the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter." *Id.* Congress intended by that provision to create a plain, speedy, and inexpensive remedy for the resolution of disputes betwen State licensing agencies and federal host agencies arising under the Act.

By holding that such arbitration panels (herein, "RSA arbitration panels") have no remedial authority, the decision below (*Maryland State Department of Education v. U.S. Department of Veterans Affairs*, 98 F.3d 165 (4th Cir. 1996)) renders that remedy illusory. If that decision remains the law in the Fourth Circuit, the mission of the Virginia Department for the Visually Handicapped will by hampered severely—both because recalcitrant federal agencies will be able to postpone the final resolution of disputes, virtually *ad infinitum*, and because the costs of pursuing such resolutions will be multiplied several times over. The States of Colorado, Illinois, Mississippi and Rhode Island join Virginia in seeking review, because they are concerned that the Fourth Circuit decision, if not corrected, could be followed by federal courts in their own jurisdictions to the prejudice of their own programs for licensing blind vendors.

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[1] Currently, there are 58 blind vendors licensed by Virginia on federal properties, 22 by Colorado, 39 by Illinois, 13 by Mississippi, and 4 by Rhode Island.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision holds that an RSA arbitration panel has no remedial authority and no authority to do anything other than "determine whether the federal entity is in violation of the Act." 98 F.3d at 169. It acknowledges and does not challenge Maryland's contention that under its reading of the Act, "a federal entity can simply refuse to remedy the violations found by a § 107d-1(b) panel," *id.* at 170, leaving it up to the State agency to "file another complaint with the Secretary and have a second arbitration panel determine whether the federal entity's acts in response to the first decision bring it into compliance with the Act," *id.* at 171. It thus remits enforcement of the Act, and of RSA arbitration panel decisions, to the federal agencies that have violated the Act; and it leaves enforcement of blind vendors' substantive rights to "priority" in the operation of vending facilities on federal property to the federal agencies that have violated those rights. In short, it renders the Act a toothless, unenforceable statement of aspirations. It does so by focusing narrowly on a single provision of the Act, by construing the ambiguous language of that provision as plain, and by construing that ambiguous language in a way that is contrary to the intent of Congress as manifested by the Act's language, purposes, functions and history.

The decision below is in conflict with a recent decision of the Eighth Circuit, and it reflects a deeper confusion among the lower courts regarding the proper interpretation and application of the arbitration provisions of the Act. The question presented also is of critical importance to the functioning of the Randolph-Sheppard Act, a statute that Congress enacted to provide many of our blind citizens a means of supporting themselves and becoming productive citizens and taxpayers, both for the benefit of themselves and for the good of our Nation as a whole. To settle the inter-Circuit conflict, and to hasten the demise

of an erroneous decision which now governs Randolph-Sheppard Act arbitration proceedings throughout the Fourth Circuit, the *amici* States urge the Court to grant the petitions in this case.

ARGUMENT

I. THE RANDOLPH-SHEPPARD ACT AND THE FOURTH CIRCUIT DECISION

Congress enacted the Randolph-Sheppard Act in 1936, "to 'provid[e] blind persons with remunerative employment, enlarg[e] the economic opportunities of the blind, and stimulat[e] the blind to greater efforts in striving to make themselves self-supporting.'" 98 F.3d at 167, quoting 20 U.S.C. § 107(a). It assigned "priority . . . to blind persons licensed by a State agency" in the "operation of vending facilities on Federal property." *Id.*, § 107(b). The Secretary of Education ("Secretary") administers the Act and is charged to issue regulations "to assure that . . . (1) the priority under this subsection is given to such licensed blind persons . . . and (2) wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States." *Id.*

As originally enacted, § 107 simply "authorized" blind persons licensed by State agencies under the Act to operate vending stands on federal property. It was amended in 1954 to give blind persons licensed under the Act a new "preference" in such assignments, and to charge each department or agency in control of federal property to "prescribe regulations designed to assure such preference . . . without *unduly inconveniencing* such departments and agencies *or* adversely affecting the interests of the United States." Pub. L. No. 83-565, Ch. 655, 68 Stat. 663 (emphases added).

The 1974 amendments were enacted in response to extensive evidence that the blind vending stand program

"has not developed, and has not been sustained in the manner and spirit in which the Congress intended at the time of its enactment." Pub. L. No. 93-516, § 202, 88 Stat. 1623 (Congressional findings). Among other things, the legislative record shows that some federal agencies chronically resisted the requirements of the Act, often due to the competing interests of employee benefit organizations, and that they were able to evade those requirements because the Act lacked any effective enforcement mechanism. *See, e.g., Randolph-Sheppard Act for the Blind Amendments of 1973, Hearings Before the Subcommittee on the Handicapped of the U.S. Senate Committee on Labor and Public Welfare, 93d Cong., 1st. Sess., on S. 2581,* at 20, 23, 24-27, 31-32, 68-73, 303-04.

The 1974 amendments made other changes in § 107, whose earlier history is discussed above. These amendments divided § 107 into subsections, and in § 107(b) they (1) changed the "preference" to a "priority"; (2) centralized the duty to promulgate regulations in the Secretary; (3) deleted the exemption for cases that would "unduly inconvenienc[e]" host agencies; (4) ordered that "[a]ny limitation" on a vendor facility based on a host agency's finding that it would adversely affect the interests of the United States "*shall be fully justified in writing* to the Secretary, who *shall determine* whether such limitation is justified"; and (5) made such determinations "binding" on host agencies. (Emphasis added.)

The 1974 amendments also added several new sections, including 20 U.S.C. §§ 107d-1 and 107d-2, the sections most directly at issue here. Those sections create two new, largely parallel enforcement mechanisms, governed by §§ 107d-1(a) and (b) and procedurally by § 107d-2. Subsection (a) of § 107d-1 allows any blind licensee to submit disputes with a State licensing agency for an evidentiary hearing before that agency; and if the licensee is dissatisfied with its action "he may file a complaint with the Secretary who shall convene a panel to arbitrate the dis-

pute pursuant to section 107d-2 . . ., and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter." Subsection (b) of § 107d-1 similarly provides that a State licensing agency which determines that a federal host agency is failing to comply with the Act or its regulations "may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2"; and again, "the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter."

Section 107d-2 governs procedure in arbitrations under § 107d-1, including (a) notice and hearing, (b) composition of the panel and "termination of violations," (c) publication of panel decisions in the Federal Register, and (d) payment of costs by the Secretary. Section 107d-2(a) provides that an RSA arbitration panel decision "shall be subject to appeal and review as a final agency action" under the Administrative Procedure Act (APA).

There is one significant distintion, however, between arbitrations requested by blind licensees, under § 107d-1(a), and arbitrations requested by State licensing agencies, under § 107d-1(b): Section 107d-2(b) provides for "termination of violations" (subsection caption) in cases under § 107d-1(b) but *not* in cases under § 107d-1(a).[2] The distinction most likely reflects the different origins of such cases. Section 107d-1(b) provides for arbitration when "any State licensing agency determines that any department, agency, or instrumentality of the United States . . . is *failing to comply with the provisions of this Act or any regulations issued thereunder*" (emphasis added). Section 107d-1(a), on the other hand, authorizes

[2] Specifically, § 107d-2(b)(2) provides that if the arbitration panel finds the federal agency in violation of the Act or its regulations, the head of the agency "shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel." There is no corresponding provision applicable to arbitrations under § 107d-1(a).

arbitration when a blind licensee is "dissatisfied with any action arising from the operation or administration of the vending facility program." In other words, Congress enacted § 107d-1(b) to create a remedy for federal agency recalcitrance—an issue that does not arise with State licensing agencies.

The Fourth Circuit opinion cites broadly and quotes at length from *Georgia Dept. of Human Resources v. Nash*, 915 F.2d 1482, 1487-95 (11th Cir. 1990) ("*Nash*"), a case under § 107d-1(a) (and not § 107d-1(b), at issue here), and especially *dicta* in *Nash*;[3] but its reading of the statute focuses narrowly on the portion of subsection (b)(2) of § 107d-2 which states that if an RSA arbitration panel finds a federal host agency in violation of the Act or its regulations, the head of that agency "shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel." *Id.*, quoted in opinion below, 98 F.3d at 169. Based on that provision and on *Nash*, the Fourth Circuit held that RSA arbitration panels have no remedial powers at all: "a § 107d-

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[3] The question in *Nash* was whether a blind vendor may recover compensatory damages under 20 U.S.C. § 107d-1(a), against a State licensing agency, for that agency's failure to take action against a federal entity. *See Nash*, 915 F.2d at 1484; opinion below, 98 F.3d at 170. This case, unlike *Nash*, arose under 20 U.S.C. § 107d-1(b) and not § 107d-1(a); it involves a State licensing agency's remedies against a federal agency and not a vendor's possible remedies against a State licensing agency; and it does not involve any claim for damages.

The *Nash* decision includes an "extensiv[e]" discussion of the possible remedial powers of a § 107d-1(b) panel and other issues not presented in that case. Opinion below, 98 F.3d at 170, citing *Nash*, 915 F.2d at 1487-95. Judge Clark's dissent in *Nash* criticized that discussion as both erroneous and unecessary. *See Nash*, 915 F.2d at 1501. We agree. We need not now address the merits of the Eleventh Circuit's decision under § 107d-1(a); but the procedural and factual distinctions between the two cases, discussed above, and the remedial distinction between § 107d-1(a) and § 107d-1(b), discussed in the text, warrant a highly skeptical approach to the *Nash* court's *dicta* regarding the latter.

1(b) arbitration panel will determine whether the federal entity is in violation of the Act, while the head of the federal entity will remedy the violation." *Id.*

Under the Fourth Circuit's interpretation, "a federal entity can simply refuse to remedy the violations found by a § 107d-1(b) panel," *id.* at 170, and a State agency's only remedy is to "file another complaint with the Secretary and have a second arbitration panel determine whether the federal entity's acts in response to the first decision bring it into compliance with the Act," *id.* at 171. A third RSA arbitration panel presumably could be convened to review the agency's response to the second decision; and so, on and on, potentially *ad infinitum*. *Cf. Minnesota Dept. of Jobs and Training v. Riley*, 107 F.3d 648, 650 (8th Cir. 1997) ("*Riley II*") (after nine years of resisting the requirements of the Act, "[i]t is time for the [Veterans Canteen Service]'s scorched-earth campaign to end"). In short, in the Fourth Circuit, host agencies that violate the Act are "vested with the responsibility to end the acts found in violation," 98 F.3d at 170; and State licensing agencies' only remedy for host agency recalcitrance is a potentially endless cycle of non-final arbitration proceedings.

II. THE FOURTH CIRCUIT'S DECISION IGNORES MUCH OF THE LANGUAGE OF THE ACT AND IS CONTRARY TO CONGRESS' INTENT

As discussed above, the Fourth Circuit opinion focuses broadly on *Nash* and narrowly on the charge given by § 107d-2(b)(2) to heads of federal agencies that have violated the Act—to "cause such acts or practices to be terminated promptly and [to] take such other action as may be necessary to carry out the decision of the panel." It concludes that RSA arbitration panels can decide *only* "whether a federal entity's acts 'are in violation' of the Act"; they cannot "order the federal entity to take any remedial action." 98 F.3d at 170, quoting *Nash*, 915 F.2d at 1492.

The Fourth Circuit's interpretation is not merely "cumbersome," 98 F.3d at 171. It is wrong. It construes ambiguous statutory language as plain, in a way that is contrary to Congress' intent as manifested by the Act's purposes, functions and history, and that ignores the meaning of other provisions of the same Act. Subsection (b)(2) of § 107d-2 is not written in "plain language," as stated in the Fourth Circuit opinion. It is capable of two different readings, and the Fourth Circuit overlooked the reading that best effectuates the purposes of the statute and the plain meaning of the statute, and which best functions together with its remaining parts.

Section 107d-2(b)(2) requires the heads of federal agencies to "cause such [violations] to be terminated promptly" and to take "other action . . . to carry out" RSA arbitration panel decisions. Agency heads naturally have that responsibility; but that does not detract from the remedial authority of the RSA arbitration panels. Congress quite naturally did not create a "Randolph-Sheppard Police Force" with authority to move into federal agencies' executive suits and direct agency personnel in carrying out RSA arbitration panel decisions; it gave that responsibility to the officers in charge of the agencies. The language charging federal agency heads to "cause" violations "to be terminated promptly" means nothing other than that. The requirement that federal agencies "take such *other action* as may be necessary to *carry out the decision of the panel*" (emphases added), however, goes further; if an arbitration panel may do nothing more than determine that a federal agency is violating the Act, as the Fourth Circuit has held, then there is nothing *to* "carry out" (*i.e.*, to implement, or to execute)[4] and that provision is meaningless.

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[4] The *New Lexicon Webster's Dictionary* (New York 1988) defines "carry out" as "to fulfill, put (orders, etc.) into effect." *Webster's New World Dictionary of the American Language* (New York 1966) defines "carry out" as "1) to put (plans, instructions, etc.) into practice. 2) to get done; bring to completion; accom-

At a *minimum*, the reading presented above is a plausible interpretation of the statutory language that contradicts the "plain meaning" interpretation in the Fourth Circuit opinion—*i.e.*, it demonstrates that the statute is ambiguous. It therefore is proper to turn to other traditional tools of statutory construction, such as the Act's purposes, history, structure, and the working of the statute as a whole.

The Fourth Circuit's focus on the seemingly "plain" language of § 107d-2(b)(2) obscured its view of the remainder of §§ 107d-1 and 107d-2, which provide for appointment of panels to "arbitrate" disputes and authorize those panels to issue "decision[s]" that are "final and binding" and "subject to appeal and review as a final agency action" under the APA. Congress did not intend for the words "arbitrate" or "decision" or "final and binding" to mean something unique in this Act—a "decision" limited to findings of violation, made by an "arbitrat[ion]" panel without power to remedy the violation. It referred to a decision that left nothing to be done but for the agency head to implement the remedy ordered by that decision. Likewise, when Congress provided for judicial review of RSA panel decisions as "final agency action[s]" under the APA, it had in mind the traditional concept of finality that applies in that context. *See infra* at 12-13.

As noted in the Fourth Circuit's opinion, the Act is a labor and employment statute, enacted "to 'provid[e] blind persons with remunerative employment,'" enlarge their economic opportunities, and assist them in becoming more self-supporting. 98 F.3d at 167. In fact, the structure of the Act, and particularly the Secretary's regulations, share a number of characteristics in common with

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plish." Merriam-Webster's WWWebster Dictionary (Internet URL http://www.m-w.com/netdict.htm) similarly defines "carry out" as "1: to put into execution <carry out a plan> [;] 2: to bring to a successful issue: COMPLETE, ACCOMPLISH <you will be paid when you have carried out the assignment> . . . ."

federal labor law.[5] It therefore is not surprising that when Congress decided in 1974 that the Act required new tools for enforcement, it turned to the arbitration mechanism that had proved so successful in resolving disputes in conventional labor-industrial relationships.

A lengthy discussion of federal labor arbitration law is not needed. This Court knows well that in *any* form of "arbitration" known to Congress in 1974, arbitration panels had authority to order remedies for violations of the governing standard (for example, a collective bargaining agreement), and that with rare exceptions, their decisions were final.[6] There is no basis for an assumption that Congress intended a different meaning in the Randolph-Shepard Act. *See Delaware Dept. of Health and Social Services v. U.S. Dept. of Education*, 772 F.2d 1123, 1130 (3rd Cir. 1985): "Except for the unique

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[5] The Act and regulations authorize State licensing agencies to set aside funds from vending facility proceeds for "[t]he establishment . . . of retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time . . ." 34 C.F.R. § 395.9(5); *see* 20 U.S.C. § 107b(3)(E). State licensing agencies must provide vocational and other training services to blind vendors, including on-the-job training in all aspects of vending facility operation. 34 C.F.R. § 395.11. In effect, a blind vendor operates a small business in partnership with a State licensing agency. *See generally* 20 U.S.C. § 107b; *cf.* 34 C.F.R. §§ 395.4, 395.6, and 395.7.

[6] *See generally, e.g., United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *La Vale Plaza v. Noonan*, 378 F.2d 569, 572 (3rd Cir. 1967) ("[t]he general principle in a common law arbitration is that the arbitrators are the final judges of both the facts and the law and their decision will not be disturbed for a mistake of fact or of law"); *Gramling v. Food, Machinery & Chemical Corp.*, 151 F. Supp. 853, 857 (W.D. S.C. 1957) (reciting the "'settled rule that courts will not review the findings of law and fact contained in an award, and will never undertake to substitute their judgment for that of the arbitrators.' Any other rule would make an award the commencement, not the end, of litigation").

judicial review provision, there is no indication . . . that Congress used the term arbitration in any manner different from its conventional usage in other contexts."

The Fourth Circuit opinion, however, assumes implicitly that the Act uses the word "arbitrate" to mean something different from what it ever has meant before. Ample case law demonstrates that a court should not indulge in such an assumption unless compelled to do so. *See, e.g., NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms"); *FDIC v. Meyer*, 510 U.S. 471, ——, 114 S. Ct. 996, 1001 (1994) ("In the absence of . . . a definition [in the statute], we construe a statutory term in accordance with its ordinary or natural meaning").

The Fourth Circuit's decision also is contrary to the portion of 20 U.S.C. § 107d-2(a) which provides that an RSA arbitration panel "decision . . . shall be subject to appeal and review as a final agency action" under the APA. Under the Fourth Circuit's opinion, an RSA arbitration panel's decision is not final, not enforceable, and not reviewable, under the APA or otherwise. It is merely a finding of a violation and a prelude to a new round of equally-inconclusive arbitration. Finality, enforceability, and reviewability all are left to the violator to resolve. A State agency (or its licensee) is not "aggrieved" by an RSA panel "decision" that finds a violation, and therefore it cannot obtain review of that decision (5 U.S.C. § 702). It will be aggrieved in some cases by host agencies' failures to comply with the Act *despite* an RSA arbitration's panel findings; but the only review of those failures is not under the APA, but to "have a second arbitration panel determine whether the federal entity's acts in response to the first decision bring it into compliance with the Act." 98 F.3d at 171.

At least in some cases, the result of the Fourth Circuit's holding will be an endless series of advisory decisions. State licensing agencies will have no means to enforce the Act against federal agencies. Congress acted to create a mechanism for "prompt and satisfactory disposition of blind licensee and state agency complaints" (S. Rep. No. 93-937 at 20, *reprinted in* 1974 U.S.C.C.A.N. 6373); the Fourth Circuit has taken it away.

The Fourth Circuit opinion concedes that "it may have been wiser for Congress to have provided for an automatic review of the remedial steps taken by a federal entity," but it concludes that leaving States without such a review is not " 'so gross as to shock the general moral or common sense.' " 98 F.3d at 170-71, *quoting Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). In our view, the fact that State licensing agencies are left without an effective means of seeking judicial enforcement of the decisions of RSA arbitration panels does "shock the general moral or common sense"; *and* it is contrary to the express will of Congress.

The Fourth Circuit's decision flies in the face of its recognition that "Congress enacted the Act to 'provid[e] blind persons with remunerative employment, enlarge[e] the economic opportunities of the blind, and stimulat[e] the blind to greater efforts in striving to make themselves self-supporting' " (98 F.3d at 167, quoting 20 U.S.C. § 107(a)), because it creates a broad avenue for recalcitrant federal agencies to frustrate (or at best to delay severely) the efforts of State licensing agencies to provide such employment. Its decision is even more clearly contrary to its acknowledgment "that Congress enacted the remedial provisions of the Act to 'provide the means by which aggrieved vendors and State agencies may obtain a final and satisfactory resolution of disputes.' " 98 F.3d at 171, quoting 1974 legislative history. According to the Fourth Circuit, the wrongdoer is left to police his own wrong; neither a blind licensee nor a State

licensing agency may enforce the Act against an obstinate federal agency. Their only recourse is to engage in endless, unenforceable "arbitrations"—prevailing in theory, aggrieved in fact but not in law, without a final order, unable to obtain judicial enforcement or review.

As the Eleventh Circuit panel's majority stated in *Nash*, this construction leaves State agencies and blind vendors "no substantive right" and "no substantive remedy"—only a "procedural right to complain" that is almost "empty." 915 F.2d at 1488. That is entirely inconsistent with the intent of Congress, as expressed in both the legislative history (*see, e.g., Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 101-03 (D.C. Cir. 1986); National Federation of the Blind's Petition for Certiorari at 23) and the language of the Act.

III. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE AN INTER-CIRCUIT CONFLICT

In *Riley II*, 107 F.3d 648, the Eighth Circuit affirmed a district court order "which granted Minnesota's motion to enforce [an RSA arbitration] Panel's decision" that the Veterans Canteen Service (VCS) is subject to the Randolph-Sheppard Act and does not have the right to install and operate vending machines to compete with a Randolph-Sheppard Act licensee. *Id.* at 649. The Eighth Circuit took the position that its decision was not in conflict with the decision in this case (or with the Eleventh Circuit's decision in *Nash*, 915 F.2d 1482), because the arbitration panel "never ordered the VCS to take any remedial action, but simply decided competing VCS vending machines at the VA Medical Center would violate the Act." *Riley II*, 107 F.3d at 650.

We respectfully disagree. The district court in *Riley* entered an "enforcement order," *id.* at 649, which it characterized as a preliminary injunction; but the Eighth Circuit "agree[d] with the VCS that, for the purpose

of review, [it] should treat the order as a permanent injunction." *Id.* It appears quite clear that under *Riley II*, if a federal agency refuses to implement an RSA arbitration panel's award, a State licensing agency may obtain an injunction in a federal district court enforcing the award. But in the Fourth Circuit, under the decision below, there is no "automatic review of the remedial steps taken by a federal entity in response to an arbitration decision"—a State licensing agency's only remedy is to "file another complaint with the Secretary and have a second arbitration panel determine whether the federal entity's acts in response to the first decision bring it into compliance with the Act." Opinion below, 98 F.3d at 171.

The conflict seems clear, and it is not likely to go away by itself. Decisions under § 107d-1(a) (such as *Nash*, 915 F.2d 1482 (11th Cir. 1990), *Delaware Dept. of Health and Social Services v. U.S. Dept. of Education*, 772 F.2d 1123 (3rd Cir. 1985), and *Hudson v. Boxer*, 632 F. Supp. 1569 (D. Colo. 1986)) are not directly pertinent to the issues presented by this case, but they also reflect a deep confusion among the lower courts as to the proper interpration and application of the arbitration provisions of the Act. The current status of the law is that (1) in the Third Circuit (*see Delaware Dept. of Health*), a blind licensee may recover compensatory damages and attorneys' fees in an arbitration against a State licensing agency under § 107d-1(a); (2) in the Eleventh Circuit (*see Nash*)—and probably in the Fourth Circuit, in view of its reliance on *Nash* in the decision below—an RSA arbitration panel may not grant *any* form of relief in an arbitration under the same statute; (3) in the Fourth Circuit (*see* decision below), a § 107d-1(b) arbitration panel has no remedial authority and a district court may not enforce its decision; and (4) in the Eighth Circuit (*see Riley II*), the remedial authority of a § 107d-1(b) arbitration panel is not clear, but it *is* clear that a district court

may enter an injunction enforcing a panel's decision; and (5) at least in Colorado (*see Hudson*), blind vendors may obtain a preliminary injunction against State officials to maintain the status quo pending arbitration. Other filings in this case document the fact that other lower courts have faced similar issues as well, with similarly inconsistent results.

Finally, the issue is of critical importance to the effective functioning of the Randolph-Sheppard Act and of State licensing agencies established under that Act. As noted at the outset, if the Fourth Circuit's decision is the law, the ability of State licensing agencies to accomplish their missions will be hampered severely—because a federal agency that is disinclined to comply with the Act or with an arbitration award will be able to postpone its compliance indefinitely, and because the costs to State licensing agencies of seeking such compliance will be multiplied several times over. The ultimate losers, of course, will not be the State licensing agencies or the taxpayers who support them. The greatest losers will be the blind citizens of our Nation, who will be denied the opportunities that Congress gave them when it enacted and amended the Act—the opportunities to achieve remunerative employment, to support themselves, and to increase their actual and personal sense of dignity and value to themselves and their communities.

CONCLUSION

The Commonwealth of Virginia and the States of Colorado, Illinois, Mississippi, and Rhode Island respectfully submit that the Court should grant the petitions for certiorari and reverse the judgment below.

Respectfully submitted,

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